

1 KATHY E. MOUNT, SBN 104736
 2 TERRY ROEMER, SBN 151894
 3 MEYERS, NAVE, RIBACK, SILVER & WILSON
 4 555 12th Street, Suite 1500
 5 Oakland, CA 94607
 6 kmount@meyersnave.com
 7 Phone: (510) 808-2000
 8 Facsimile: (510) 444-1108

9 Attorneys for Defendants
 10 City of Pittsburg, Chief of Police Aaron Baker,
 11 Capt. William Zbacnik, Lt. Michael Barbanica,
 12 Lt. William "Brian" Addington, Lt. Wade Derby

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 RON HUPPERT and JAVIER SALGADO,

16 Plaintiffs,

17 v.

18 CITY OF PITTSBURG, CHIEF OF POLICE
 19 AARON BAKER, CAPT. WILLIAM ZBACNIK,
 20 LT. MICHAEL BARBANICA, LT. WILLIAM
 21 "BRIAN" ADDINGTON, LT. WADE DERBY,
 22 and DOES 1-40,

23 Defendants.

Case No.: C 05-01433 JL

**SEPARATE STATEMENT OF
 UNDISPUTED MATERIAL FACTS IN
 SUPPORT OF DEFENDANTS CITY OF
 PITTSBURG, AARON BAKER,
 WILLIAM ZBACNIK, MICHAEL
 BARBANICA, WILLIAM ADDINGTON
 AND WADE DERBY'S MOTION FOR
 SUMMARY JUDGMENT OR IN THE
 ALTERNATIVE MOTION FOR
 SUMMARY ADJUDICATION OF
 CLAIMS ASSERTED BY PLAINTIFF
 SALGADO**

DATE: August 2, 2006
 TIME: 9:30 a.m.
 DEPT: Courtroom F, 15th Floor

Complaint Filed: April 7, 2005

24 Defendants City of Pittsburg, Chief of Police Aaron Baker, William Zbacnik, Michael
 25 Barbanica, William Addington, and Wade Derby submit the following statement of
 26 undisputed material facts, together with references to supporting evidence, in support of
 27 their motion for summary judgment or, in the alternative, summary adjudication of claims
 28 asserted by Plaintiff Javier Salgado.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
1. Plaintiff Javier Salgado first became employed by the City of Pittsburgh as a police officer on April 9, 1995.	1. Declaration of Marc Fox ("Fox Decl.") ¶ 2 NOT DISPUTED BY PLAINTIFF
2. Salgado remained in the classification of police officer during his entire period of employment with the City of Pittsburgh.	2. Fox Decl. ¶ 2 NOT DISPUTED BY PLAINTIFF
3. In or about September - October 2001, Chief Baker assigned Salgado and Ron Huppert to investigate allegations of wrongdoing by police officers at the City golf course. All reports and information Huppert provided to the Police Chief and City Manager regarding that investigation were pursuant to Salgado's official responsibilities as a police officer.	3. Declaration of Kathy Mount ("Mount Decl.") Exhibit A (Salgado Depo. Tr. 142:21-143:6); Declaration of Aaron Baker (Baker Decl.) ¶ 3 NOT DISPUTED BY PLAINTIFF
4. In October 2001, Salgado and Huppert submitted memos to Chief Baker reporting their findings regarding the golf course investigation.	4. Baker Decl. ¶ 8; Exhibits A,B,C NOT DISPUTED BY PLAINTIFF
5. Salgado testified in his deposition that, in 2002, Defendant Michael Barbanica ordered the police officers not to bail out Officer Reuben Vasquez, a Hispanic police officer, when he was put in jail overnight. However, Salgado testified that he was aware of at least four other instances of police officers who were jailed and not bailed out by fellow officers – one such officer was Caucasian and three other officers were African-American.	5. Mount Decl., Exhibit A (Salgado Depo. Tr. 127:7-134:10) DISPUTED BY PLAINTIFF
6. Salgado testified in his deposition that, in February 2002, Defendants Barbanica and Addington accused him of being in a vehicular pursuit that Salgado was not involved in, in retaliation for Salgado's report of the golf course investigation. However, the matter was "dropped" and no disciplinary action was taken against Salgado related to this incident.	6. Mount Decl., Exhibit A (Salgado Dep. Tr. 158:23-165:1) NOT DISPUTED BY PLAINTIFF

1 2 3 4 5 6 7	7. In March 2002, Salgado and Huppert were assigned to patrol City refineries. Their assignment was to drive in and around the refineries looking for suspicious persons. Salgado testified in his deposition that he was given no training regarding how to handle a chemical leak at the refineries. However, it was not part of his duties to handle chemical leaks. He had been told by Barbanica that, if there was a leak, they should "get the hell out of there."	7. Mount Decl., Exhibit A (Salgado Depo. Tr. 259:14-263:15) DISPUTED BY PLAINTIFF
8 9 10 11	8. In late 2003 or early 2004, the police department initiated an internal affairs investigation and criminal investigation into alleged falsification of police records by police officer Jim Hartley, a Caucasian.	8. Mount Decl., Exhibit A (Salgado Depo. Tr. 82:13-15); Baker Decl. ¶¶ 4,5 NOT DISPUTED BY PLAINTIFF
12 13 14	9. Hartley resigned from employment before the internal affairs investigation was completed.	9. Baker Decl. ¶ 5; Mount Decl. Exhibit A (Salgado Depo. Tr. 83: 9-15) NOT DISPUTED BY PLAINTIFF
15 16 17	10. Officer Hartley was subsequently convicted of felonies for falsifying police reports.	10. Baker Decl. ¶ 5; Mount Decl., Exhibit A (Salgado Depo. Tr. 83: 6-8) NOT DISPUTED BY PLAINTIFF
18 19 20 21 22	11. In light of the concern over Hartley's report writing improprieties, Chief Baker decided to have an audit done of all the department's police reports regarding "under the influence" arrests to determine whether other officers had engaged in "cutting and pasting" information from one report to another.	11. Baker Decl. ¶ 6 NOT DISPUTED BY PLAINTIFF
23 24 25	12. Sergeant Steiner and Lieutenant Wade Derby conducted the audit of those police reports. The audit revealed that Salgado had several reports that had been "cut and pasted."	12. Baker Decl. ¶ 6; Mount Decl., Exhibit A (Salgado Depo. Tr. 81: 14-82:1; 82:16-83:2) DISPUTED BY PLAINTIFF
26 27 28	13. After learning the results of the audit, Chief Baker decided to commence both a criminal investigation and an internal affairs	13. Baker Decl. ¶ 7 DISPUTED BY PLAINTIFF

1	investigation into Salgado's report writing improprieties.	
2		
3	14. Chief Baker chose Lieutenant Barbanica to conduct the internal affairs investigation and Lieutenant Addington to conduct the criminal investigations. In consultation with the District Attorney's office, Chief Baker determined that it was not inappropriate for Addington to conduct this investigation even though he had reviewed and approved some of Salgado's police reports.	14. Baker Decl. ¶ 7 DISPUTED BY PLAINTIFF
4		
5	15. The internal affairs investigation concluded that Salgado had falsified police reports.	15. Baker Decl. ¶ 9 NOT DISPUTED BY PLAINTIFF
6		
7		
8	16. Based on the IA report, Chief Baker decided to initiate termination proceedings against Salgado. The reasons for his termination were as stated in the "Notice of Proposed Disciplinary Action," dated July 15, 2004, which was given to Salgado.	16. Baker Decl. ¶ 9, Exhibit E DISPUTED BY PLAINTIFF
9		
10	17. On or about July 15, 2004, Salgado was provided with written Notice of Proposed Disciplinary Action which proposed termination, the reasons therefore, a copy of the materials on which the proposed action was based, and was informed of his right to respond, either orally or in writing, to the charges.	17. Baker Decl. ¶ 10, Exhibit E; Mount Decl., Exhibit A (Salgado Depo. Tr. 98:19 - 99:3) NOT DISPUTED BY PLAINTIFF
11		
12	18. Chief Baker set a date for the Skelly hearing for July 23, 2004, at which Salgado could present his response to the Chief regarding the charges in the Notice of Proposed Disciplinary Action. However, Salgado and his attorney failed to appear at the scheduled time for the Skelly hearing.	18. Baker Decl. ¶ 11 DISPUTED BY PLAINTIFF
13		
14	19. During July 2004, City Manager Marc Grisham was on vacation. Chief Baker was appointed Acting City Manager for the period of time Mr. Grisham was on vacation.	19. Baker Decl. ¶ 12 NOT DISPUTED BY PLAINTIFF
15		
16	20. Having not heard from Salgado on July 23 rd , Chief Baker concluded that Salgado had waived his right to a Skelly hearing.	20. Baker Decl. ¶ 12 DISPUTED BY PLAINTIFF
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1	21. On July 26th, Baker issued a Notice of Disciplinary Action to Salgado.	21. Baker Decl. ¶ 12, Exhibit F NOT DISPUTED BY PLAINTIFF
2		
3	22. On July 26, 2004, Chief Baker received a letter from Salgado's attorney, Matthew Pavone, complaining that Salgado had not been given an adequate opportunity for a Skelly hearing.	22. Baker Decl. ¶ 13 NOT DISPUTED BY PLAINTIFF
4		
5		
6	23. Chief Baker decided to withdraw the July 26 th Notice of Disciplinary Action and defer the matter to the City Manager, Marc Grisham, for a final decision when he returned to the office on August 2, 2004. On July 27, 2004, Chief Baker sent a letter to Mr. Pavone explaining his actions.	23. Baker Decl. ¶ 13; Exhibit G; Mount Decl., Exhibit A (Salgado dep. Tr. 99:13-102:6) NOT DISPUTED BY PLAINTIFF
7		
8		
9		
10	24. City Manager Grisham conducted a Skelly hearing on August 11, 2004, at which Salgado presented his response to the charges contained in the July 15 th Notice of Proposed Disciplinary Action.	24. Baker Decl. ¶ 14; Mount Decl., Exhibit A (Salgado dep. Tr. 99:13-102:6; 106:5-21; 108:12-109:9) DISPUTED BY PLAINTIFF
11		
12		
13		
14	25. On or about August 24, 2004, Mr. Grisham issued a notice of disciplinary action to Salgado, which set forth the grounds for Salgado's termination, and notified Salgado of his right to appeal the decision.	25. Baker Decl. ¶ 14, Exhibit H.; Mount Decl., Exhibit A (Salgado dep. Tr. 85:18-25) DISPUTED BY PLAINTIFF
15		
16		
17		
18	26. Salgado's termination became effective on August 24, 2004.	26. Baker Decl. ¶ 15; Fox Decl. ¶ 4 NOT DISPUTED BY PLAINTIFF
19		
20	27. Salgado declined to appeal his termination.	27. Fox Decl. ¶ 6; Exhibit B; Mount Decl., Exhibit A (Salgado 109:11-24) DISPUTED BY PLAINTIFF
21		
22		
23		
24	28. After Salgado was terminated, on October 13, 2004, he was convicted of five counts of felony violation of Penal Code section 118.5 for knowingly and intentionally filing a false report be a peace officer.	28. Mount Decl. ¶ 4, Exhibit C (Salgado Rev. Supp. Resp. to Req. For Admission No. 3) NOT DISPUTED BY PLAINTIFF
25		
26		
27		
28		

29. Salgado pled no contest to his felony convictions.	29. Mount Decl., Exhibit A, (Salgado Depo. Tr. 49: 2-19) NOT DISPUTED BY PLAINTIFF
30. Because Salgado has been convicted of at least one felony, he cannot be employed as a police officer in California.	30. Mount Decl., Exhibit A. (Salgado Depo. Tr. 85:11-17) DISPUTED BY PLAINTIFF
31. Prior to his termination, Salgado had not been subjected to any disciplinary action, demotion, or loss of pay or benefits.	31. Baker Decl. ¶ 16; Fox Decl. ¶ 3 DISPUTED BY PLAINTIFF
32. Salgado is Nicaraguan. He was born in the United States, but his parents were both born in Nicaragua.	32. Mount Decl., Exhibit A (Salgado Depo. Tr. 272:10-17) NOT DISPUTED BY PLAINTIFF
33. Salgado never complained of discrimination, either with regard to himself or anyone else, while he was employed by the City of Pittsburg.	33. Mount Decl., Exhibit A (Salgado Depo. Tr. 140:3-5; Baker Decl. ¶ 18) NOT DISPUTED BY PLAINTIFF
34. To Salgado's knowledge, no one employed in the City of Pittsburg Police Department has ever made a racial comment directed at Salgado.	34. Mount Decl., Exhibit A (Salgado Depo. Tr. 259:2-4) DISPUTED BY PLAINTIFF
35. Salgado filed a complaint with DFEH on March 25, 2005, complaining of discrimination based on ethnicity and race and retaliation.	35. Fox Decl. ¶ 7; Exhibit C NOT DISPUTED BY PLAINTIFF
36. Salgado filed his complaint in this court on April 7, 2005.	36. Mount Decl. ¶ 3, Exhibit B NOT DISPUTED BY PLAINTIFF
37. Salgado admits that the City is immune from a common law action for negligence.	37. Mount Decl. ¶ 4, Exhibit C (Salgado Rev. Supp. Resp. to Req. for Admissions No. 2) NOT DISPUTED BY PLAINTIFF

38. Salgado admits that the City is immune from a common law action for intentional infliction of emotional distress.

38. Mount Decl. ¶ 4; Exhibit C
(Salgado Rev. Supp. Resp. to
Req. for Admissions No. 1)

NOT DISPUTED BY PLAINTIFF

Dated: June 28, 2006

Meyers, Nave, Riback, Silver & Wilson

By /S/ KATHY E. MOUNT 06/28/2006
Kathy E. Mount
Attorney for Defendants

840282v1; 1029.4005